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No. 84-231

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IN THE
Supreme Court of the United States

October Term, 1983

ALVIN D. HOOPER AND MARY N. HOOPER,
Appellants,

v.

BERNALILLO COUNTY ASSESSOR,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF NEW MEXICO

MOTION TO DISMISS APPEAL OR AFFIRM
DECISION OF THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

HUNTER L. GEER

P. O. Box 8248

Albuquerque, New Mexico 87198

(505) 266-5501

Counsel for Appellee

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**MOTION TO DISMISS APPEAL OR AFFIRM
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COMES NOW the Appellee, and hereby moves this Court to dismiss the appeal, or in the alternative, to affirm the decision of the New Mexico Court of Appeals in *Hooper v. Bernalillo County Assessor*, ___ N.M. ___, 679 P.2d 840 (N.M. App. 1984); *cert. denied*, ___ N.M. ___, 678 P.2d 705 (1984), on the grounds that this Court lacks jurisdiction pursuant to 28 U.S.C. § 1257(2) or that no substantial federal question is raised by Appellants and the decision of the Court of Appeals is correct.

JURISDICTION

This appeal is improperly taken from the Supreme Court of the State of New Mexico, rather than the Court of Appeals of the State of New Mexico, because the Supreme Court of the State of New Mexico refused to grant certiorari. The "highest court" as set forth in 28 U.S.C. § 1257(2) is the Court of Appeals of the State of New Mexico. Therefore, this Court lacks jurisdiction to hear this appeal and it should be dismissed. (See *Michigan-Wisconsin Pipeline Company v. Calvert*, 347 U.S. 157, reh. den. 347 U.S. 931 (1954)).

STATEMENT OF THE CASE

The material facts asserted by Appellants are not challenged.

ARGUMENTS

INTRODUCTION

If this Court has jurisdiction to hear this appeal, then none of the issues presented by Appellants are substantial federal questions. Although violations of the Fourteenth Amendment have been asserted in the first four questions presented in the Jurisdictional Statement, the challenged legislation (§ 7-37-5 N.M.S.A. 1978, as amended, Appendix A herein) does not impact "basic necessities of life"; does not impact a fundamental interest or suspect classification; and does not impact an area of the law which is unsettled. Moreover, the fifth question presented in the Jurisdictional Statement on severability, is clearly not a federal question at all and was not so addressed in the lower courts. Therefore, that matter should be summarily disposed of by affirming the lower court's decision.

I. THE RESIDENCY REQUIREMENTS OF § 7-37-5 N.M.S.A. 1978, AS AMENDED, DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF SECTION ONE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The principal basis of this appeal is the unconstitutionality of the residency requirements of the New Mexico statute as it is alleged to violate the Fourteenth Amendment, Equal Protection Clause. The residency requirements are twofold. First, at the time of claiming the veteran's exemption, one must be a "bonafide" New Mexico resident (§ 7-37-5A N.M.S.A. 1978, as amended.) (This requirement is not challenged by Appellants.) The second residency requirement provides for residency for a Vietnam era veteran prior to May 8, 1976. (§ 7-37-5C(3)(d) N.M.S.A. 1978, as amended).

Intrinsic to the resolution of the entire question of equal protection is the determination of what standard for review shall be applied, and secondly, whether that standard has been transgressed. *Dunn v. Blumstein*, 405 U.S. 330 (1972). In an equal protection context, the standard of review is mandated by the right which is alleged to be denied by operation of the statute. *McGeehan v. Bunch*, 88 N.M. 308, 540 P.2d 238 (1975). When legislation impacts a fundamental interest or involves a suspect classification (race, sex, age, etc.), that legislation is subject to "strict scrutiny". *McGeehan v. Bunch, supra*. But when the interest is not fundamental or the class is not suspect, all that is required is that there be a "rational and natural basis" for the difference in treatment of the two or more classes. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *Langston v. Levitt*, 425 F. Supp. 642 (S.D.N.Y. 1977). There is no suspect classification involved in this case, and the only fundamental interest asserted by Appellants is the right to travel. Therefore, for the "strict scrutiny" test to apply, the

residency requirement of the New Mexico statute must abridge the right to travel.

In determining whether a residency requirement infringes on the right to travel, this Court classifies the requirements as durational or non-durational. A durational residency requirement provides that a person must reside within the jurisdiction for a specified length of time. *Shapiro v. Thompson*, 394 U.S. 618 (1969) and *Dunn v. Blumstein*, *supra*. All other residency requirements are deemed non-durational. Durational residency requirements can impair the fundamental right to travel while non-durational requirements cannot. *August v. Bronstein*, 369 F. Supp. 190 (S.D.N.Y. 1974), *aff'd* 417 U.S. 901 (1974). Statutes involving the receipt of veteran's benefits conditioned upon residency in a state at a fixed date in the past, i.e., at the date of induction into the military service and/or at the date of separation from the service, are non-durational residency requirements. (See *August v. Bronstein*, *supra* and *Langston v. Levitt*, *supra*). The New Mexico statute is analogous to the above situations, and does not infringe upon the fundamental right to travel.

In the cases cited by Appellants, *Shapiro*, *Dunn*, and *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), the claimants in each of those cases were denied benefits because they had not been residents for the length of time required by statute. Similarly, in *Zobel v. Williams*, 457 U.S. 55 (1982), claimants received benefits based on the length of time they had been residents of Alaska. The holdings of each of those cases involved durational residency requirements and are distinguishable from this case. The most recent authority of Appellants, *Schafer v. Vest*, 680 P.2d 1169 (Alaska 1984), principally turned upon the durational segment of the residency requirement to invalidate that statute.

Even if the residency requirement in this case was characterized as durational, it would still not interfere with the funda-

mental right to travel and violate the Equal Protection Clause. As noted in *Memorial Hospital v. Maricopa*, *supra*, the deprivation of a "basic necessity of life" or "vital government benefit" must coincide with an infringement of the right to travel for the Equal Protection Clause to be violated. A durational residency requirement does not imply a *per se* violation of the fundamental right to travel. The finding that the fundamental right to travel had been violated in *Shapiro*, *Dunn*, and *Memorial Hospital* resulted from the severity of the penalty intrinsic to the requirement. The benefits denied in the above cases because of lack of residency were essential to daily life — welfare benefits, the right to vote, and medical assistance for an indigent. This combination of a durational residency requirement and the denial of a benefit of vital importance triggered the finding that the fundamental right to travel was infringed. The veterans benefits granted by the legislation in question are clearly not so vital. Therefore, the fundamental right to travel is not infringed by the residency requirement of § 7-37-5C, and a fortiori any federal question raised by this appeal is *not* substantial.

In this case, necessarily the "strict scrutiny" test must yield to the "rational and natural basis" test in weighing the constitutionality of § 7-37-5 N.M.S.A. 1978, as amended. (See *City of New Orleans v. Dukes*, *supra*; *Allied Stores of Ohio v. Bowers*, *supra* and *Langston v. Levitt*, *supra*). The New Mexico veteran's exemption has a rational and natural basis which is neither arbitrary nor capricious. The purpose of § 7-37-5 N.M.S.A. 1978, as amended, is to reward persons who served in the military as residents of New Mexico during periods of armed conflict, or who chose to reside in New Mexico shortly after such periods. This goal has a "rational relationship to the State's legitimate interest". (*Langston v. Levitt*, *supra* at 648; See also *August v. Bronstein*, *supra*; *Rios v. Dillman*, 499 F.2d 329 (5th Cir. 1974); *Lambert v. Wentworth*, 423 A.2d 527 (Me. 1980); *Miller v. Board of County Commissioners*

of *Natrona County*, 337 P.2d 262 (Wyoming 1959)). The New Mexico Court of Appeals Opinion in this case stated:

The legislature is entitled to reward and encourage veterans to settle in New Mexico, but it is also entitled to limit the period of time within which they may choose to establish residency . . . The fact that the legislature might have furthered its purpose more completely or more equitably does not invalidate the classification. (Citations omitted.) (Appendix to Jurisdictional Statement, B16 and B17.)

One of the most compelling reasons to dismiss this appeal is the great latitude provided states in matters of taxation. When no fundamental interest is impacted by taxation classifications (*Kahn v. Shevin*, 416 U.S. 351 (1974)) the challenging party must "negative every conceivable basis which might support the classification". (*Madden v. Kentucky*, 309 U.S. 83, 88 (1940)). The Appellants failed to overcome such a burden in any of the lower court or administrative proceedings and have raised no new issues which should be considered by this Court in accepting this appeal. The grounds for this appeal are not substantial.

II. THE RESIDENCY REQUIREMENTS OF § 7-37-5 N.M.S.A. 1978, AS AMENDED, DO NOT VIOLATE THE DUE PROCESS CLAUSE OF SECTION ONE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The only due process arguments of Appellants relate to vagueness and the lack of a rational basis. (See New Mexico Court of Appeals Opinion, Appendix to Jurisdictional Statement, B19-B22). The latter issue is closely aligned with the previously discussed equal protection arguments, and the same grounds exist for dismissing the appeal as to due process. (*Patch Enterprises, Inc. v. McCall*, 447 F. Supp. 1075 (1978)).

Vagueness, on the other hand, was not addressed in the Jurisdictional Statement and should be deemed waived, or alternatively should be ignored because Appellants do not have standing. (See New Mexico Court of Appeals Opinion, Appendix to Jurisdictional Statement, B19-B22).

III. THE SEVERABILITY OF THE RESIDENCY REQUIREMENT IS NOT A FEDERAL QUESTION AND SHOULD NOT BE CONSIDERED.

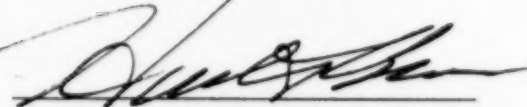
As stated previously, severability is not a federal question, and was not raised as a federal question in the lower courts or administrative proceedings. In light of the Court of Appeals of the State of New Mexico determining that § 7-37-5 N.M.S.A. 1978, as amended, was constitutional, the severability argument did not have to be addressed at that level. If this Court decides that the statute is unconstitutional, as to its residency requirement, Appellee would ask that the matter be remanded to the Court of Appeals of the State of New Mexico to determine the severability question since it was not substantively decided previously.

CONCLUSION

The issues presented by Appellants are not substantial federal questions because they do not relate to fundamental interests or suspect classifications. The state is given great leeway in matters of taxation and because this statute has a rational basis it does not violate the Equal Protection or Due Process Clauses. Therefore, Appellee respectfully requests

this Court to dismiss the appeal, or in the alternative to affirm the lower court's decision.

Respectfully submitted,



HUNTER L. GEER

P. O. Box 8248
Albuquerque, New Mexico 87198
(505) 266-5501

Counsel for Appellee

September 6, 1984

APPENDIX A

§ 7-37-5 N.M.S.A. 1978, as Amended.

7-37-5. Veteran exemption.

A. Two thousand dollars (\$2,000) of the taxable value of property, including the community or joint property of husband and wife, subject to the tax is exempt from the imposition of the tax if the property is owned by a veteran or the veteran's unmarried surviving spouse if the veteran or surviving spouse is a New Mexico resident. The exemption shall be deducted from taxable value of property to determine net taxable value of property.

B. The veteran exemption shall be applied only if claimed and allowed in accordance with Section 7-38-17 NMSA 1978 and regulations of the division.

C. As used in this section, "veteran" means an individual who:

(1) has been honorably discharged from membership in the armed forces of the United States;

(2) served in the armed forces of the United States on active duty continuously for ninety days, any part of which occurred during a period in which the armed forces were engaged in armed conflict under orders of the president; and

(3) was a New Mexico resident prior to:

(a) January 1, 1934, if the period of armed conflict during which the person served was during World War I or any conflict prior to that time;

(b) January 1, 1947, if the period of armed conflict during which the person served was World War II or any other conflict prior to that time but subsequent to the ending of hostilities of World War I;

(c) February 1, 1955, if the period of armed conflict during which the person served was the Korean conflict; or

(d) May 8, 1976, if the period of armed conflict during which the person served was the Vietnam conflict.

D. For the purposes of Subsection C of this section, a person is considered a New Mexico resident prior to January 1, 1947 if, prior to that date, he lived in an area within the external boundaries of New Mexico that was then under the exclusive jurisdiction of the United States but became and continued to be a resident of New Mexico after cession of jurisdiction back to the state.

E. For the purposes of Subsection C of this section, a person who would otherwise be entitled to status as a veteran except for failure to have served in the armed forces continuously for ninety days is considered to have met that qualification if he served during the applicable period for less than ninety days and the reason for not having served for ninety days was a discharge brought about by service-connected disablement.

F. For the purposes of Paragraph (1) of Subsection C of this section, a person has been "honorably discharged" unless he received either a dishonorable discharge or a discharge for misconduct.